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In the
Court of Criminal Appeals of Texas
at Austin

EX PARTE ANDREW PETE,
RESPONDENT

The State of Texas,
Petitioner

From the Court of Appeals for the
Fifth District of Texas at Dallas
In Cause Nos. 05-15-01521-CR, 05-15-01522-CR, & 05-15-01523-CR

STATE'S OPENING BRIEF

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Table of Contents

Table of Authorities

Federal Cases

Texas Cases

Other State Cases

Statutes

Rules

Other Publications

Statement of the Cases

A jury found Appellant guilty of three charges of aggravated sexual assault of a child under the age of 14.[1] When defense counsel called Appellant to testify during the punishment phase, the jury saw Appellant wearing shackles.[2] Appellant's trial counsel made an oral motion for mistrial.[3] The trial court orally granted the motion as to the punishment phase only.[4] Appellant then applied for habeas relief, arguing that the trial court did not have the authority to grant a mistrial on punishment only—that the mistrial must also undo the jury's guilty verdicts.[5] The trial court denied his applications.[6] Appellant appealed the trial court's decision to deny him habeas relief, and the Fifth District Court of Appeals reversed the trial court.[7]

[1] 1 C.R. at 15, 91; 2 C.R. at 14, 79; 3 C.R. at 14, 91.

[2] 7 R.R. at 85–88.

[3] 1 C.R. at 102; 2 C.R. at 95; 3 C.R. at 103.

[4] 7 R.R. at 131.

[5] 1 C.R. at 108–11; 2 C.R. at 101–04; 3 C.R. at 109–12.

[6] 1 C.R. at 115; 1 C.R. at 79; 3 C.R. at 91.

[7] *Ex parte Pete*, Nos. 05-15-01521-CR, 05-15-01522-CR, 05-15-01523-CR, 2016 Tex. App. LEXIS 6088 (Tex. App.—Dallas June 8, 2016, pet. filed) (mem. op., not designated for publication).

Issue Presented

A new trial and a mistrial are largely "functionally indistinguishable." Here, the jury reached lawful guilty verdicts, but error tainted the punishment phase after the jury saw Appellant in shackles. Under these facts, a trial court granting a new trial must grant the new trial only as to punishment. Under the same facts, may a trial court instead order a mistrial only as to punishment?

Statement of Facts

12 citizens of Dallas County heard the evidence and agreed that Appellant committed three aggravated sexual assaults of a child under the age of 14.[8] They said so with their verdicts, finding him guilty as charged.[9]

The punishment phase began, and, at some point, Appellant was placed in shackles.[10] After the State rested, defense counsel began presenting his own punishment case.[11] He eventually called Appellant to the stand to testify. When this happened, Appellant stood up, and the jury apparently saw him wearing the shackles.[12] The jury was removed.[13] Defense counsel asked the trial court for a mistrial.[14] The trial court granted his motion, but because the error affected the punishment phase only, the trial court declared a mistrial as to punishment only.[15] Appellant disagreed with this decision. He filed applications for a writ of habeas corpus insisting that he was entitled to an entire new trial—that the jury's verdicts must be overturned.[16] The trial court denied his applications.[17]

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[8] 1 C.R. at 91; 2 C.R. at 79; 3 C.R. at 91.
[9] 1 C.R. at 91; 2 C.R. at 79; 3 C.R. at 91.
[10] 7 R.R. at 85–88.
[11] 7 R.R. at 29, 31.
[12] 7 R.R. at 85–88.
[13] 7 R.R. at 85.
[14] 7 R.R. at 86.
[15] 7 R.R. at 131.
[16] 1 C.R. at 108–11; 2 C.R. at 101–04; 3 C.R. at 109–12.
[17] 1 C.R. at 115; 1 C.R. at 79; 3 C.R. at 91.

Yet the Court of Appeals agreed with Appellant.[18] It found that Texas law requires that the untainted verdicts be undone and that the trial court abused its discretion in preserving them.[19]

Summary of the Argument

Mistrials and new trials are both remedies to correct punishment error. Indeed, this Court has observed that the two are "functionally indistinguishable." The Court of Appeals, however, drew a sharp distinction. It concluded that Texas law forbids the trial court to declare a mistrial as to punishment even though it requires the trial court to declare a new trial as to punishment under otherwise identical facts. This conclusion was incorrect. When the trial court declared the punishment-only mistrial below, the trial court reasonably analogized to the law controlling new trials, and nothing limits its discretion to do so.

[18] *Pete*, 2016 Tex. App. LEXIS 6088 at *1.

[19] *Id.*

Argument

The Court of Appeals erred in holding that a lawful guilt–innocence verdict must be undone in a mistrial because of punishment-phase error. When punishment-phase error does not affect the guilt–innocence verdict, that verdict should stand.

Standard of Review

The trial court's decision to grant habeas relief ordinarily presents a mixed question of law and fact. In reviewing such a question, an appellate court should review the facts in the light most favorable to the trial court's ruling and should uphold the ruling absent an abuse of discretion.[20] A reviewing court should afford almost total deference to the trial court's findings of fact that the record supports, especially where the findings are based on an evaluation of credibility and demeanor.[21] But if the ultimate question does not turn upon credibility and demeanor, the appellate court should apply a de novo review.[22]

A. As an initial matter, the Court of Appeals applied the wrong analysis. It should have considered whether any law limited the trial court's discretion to declare a punishment-only mistrial.

A trial court's sweeping discretion must be the touchstone of any mistrial analysis. An appellate court, after all, reviews the trial court's ruling on a motion for

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[20] *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), overruled on other grounds by *Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

[21] *Id.*

[22] *Id.*

mistrial only for abuse of discretion.[23] Under the facts here, the trial court must be able to grant a punishment-only mistrial because no controlling law dictates that it *may not* do so.

Applicable Law

A mistrial is a remedy appropriate for a narrow class of highly prejudicial and incurable errors.[24] It should be used to halt a trial only when error is so prejudicial that expenditure of further time and expense would be wasteful and futile.[25] Thus, a trial court may exercise its discretion to declare a mistrial when an impartial verdict cannot be reached or when a verdict could be reached only to be reversed on appeal because of some obvious procedural error.[26] Whether a given error requires a mistrial must be made by examining the particular facts of the case.[27]

Caselaw has long emphasized the trial court's discretion to declare or deny a mistrial. This Court expounded on this discretion in the year 1900, and little has changed since:

> The granting of a mistrial is the act of the judge. He alone can grant it, and he alone, in the exercise of a sound discretion, must determine what facts would be sufficient to authorize him to grant it. . . . In declaring a mistrial, he must, as stated above, exercise a sound legal discretion. He can not [sic] do it capriciously. If the facts which he finds and announces

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[23] *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007).

[24] *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000).

[25] *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

[26] *Id.* (citing *Sewell v. State*, 696 S.W.2d 559, 560 (Tex. Crim. App. 1983)).

[27] *Id.* (citing *Hernandez v. State*, 805 S.W.2d 409, 413–14 (Tex. Crim. App. 1990)).

> in his judgment show a legal necessity for a mistrial, a reviewing court will affirm his judgment.[28]

The U.S. Supreme Court has agreed that the mistrial is intimately connected with the trial court's discretion. In *Illinois v. Somerville*, for example, the Court explained this connection as follows:

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.[29]

The Court also underscored that no one is better positioned than the trial judge to decide whether a mistrial is necessary: "[w]here, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared . . . ."[30]

Analysis

The Court of Appeals erred when it reasoned that no authority *allows* punishment-only mistrials. That reasoning overlooks the broad discretion a trial court

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[28] *Woodward v. State*, 42 Tex. Crim. 188, 202–03, 58 S.W. 135, 141 (1900) (quoting *Stocks v. State*, 18 S.E. 847, 850 (Ga. 1893)).

[29] *Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

[30] *Id.* at 462 (quoting *Gori v. United States*, 367 U.S. 364, 368 (1961)).

has in this area. And it is backward: the real question is whether any law *restricts* the trial court's discretion—and here, it does not.

This Court demonstrated the correct analysis in *Rodriguez*.[31] In that case, the question was whether the trial court could withdraw an order granting a mistrial before the jury was discharged and before the jury ever knew a mistrial had been declared.[32] Much like this case, the intermediate appellate court in *Rodriguez* observed that mistrials are "nugatory proceedings" and held that nothing "authorized" the trial court to withdraw its order.[33] But this Court disagreed. It first pointed out that mistrials are "nowhere expressly provided for in the Code of Criminal Procedure . . . ."[34] Mistrials are creatures of the common law, created by the judiciary itself.[35] This Court, therefore, did not comb through the statutes looking for the source of trial court's power to declare a mistrial.[36] It instead reviewed statutes, rules, and its own caselaw to decide whether any law limited the trial court's authority.[37] Finding nothing of the kind, this Court concluded that the trial court's discretion carried the day.[38]

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[31] *See Rodriguez v. State*, 852 S.W.2d 516 (Tex. Crim. App. 1993).
[32] *Id.* at 520.
[33] *Id.* at 517, 520.
[34] *Id.* at 518.
[35] *See id.*
[36] *See id.* at 518–20.
[37] *See id.*
[38] *See id.* at 520.

The Court of Appeals should have used the same analysis here. Had it done so, it would have found that no controlling authority limits the trial court's discretion to declare the punishment-only mistrial below.

B. Because it was faced with error that only affected the punishment phase, the trial court correctly limited the mistrial to the punishment phase.

As noted above, this Court has observed that mistrials are "nowhere expressly provided for in the Code of Criminal Procedure . . . ."[39] No controlling authority limits the trial court's discretion to declare a punishment-only mistrial. Far from it: the trial court's decision finds ample support in caselaw and statutes.

1. *Texas law provides that lawful guilt–innocence verdicts should stand after error occurs during the punishment phase. Texas courts must preserve those verdicts when ordering new trials because of punishment error. The trial court correctly applied the same reasoning below.*

Applicable Law

A bifurcated criminal trial is one divided into two phases: guilt–innocence and punishment.[40] Texas's system of bifurcation is described in two articles in the Code of Criminal Procedure.[41] Article 36.01 explains how jury trial should unfold. It provides as follows:

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[39] *Id.* at 518.

[40] 43A George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 46:4 (3d ed. 2011).

[41] *Id.* at § 46:6.

> The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.[42]

Article 36.01 then states, "[i]n the event of a finding of guilty, the trial shall then proceed as set forth in Article 37.07."[43] Article 37.07, in turn, provides as follows:

> In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.[44]

In Texas's bifurcated-trial system, the jury first receives evidence only relevant to guilt–innocence, and it decides only that question.[45] If the jury finds the defendant guilty, then evidence may be introduced as to what punishment should be assessed.[46] As Professors Dix and Schmolesky have noted, an advantage of this system is that it "provid[es] the jury with information needed for intelligent assessment of punishment without prejudicing either the State or the defendant on the question of guilt or innocence."[47] Thus, no punishment evidence may be introduced that may cloud the jury's decision on guilt–innocence.

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[42] Tex. Code Crim. Proc. art. 36.01(a)(1) (West 2014).

[43] *Id.* at art. 36.01(a)(8).

[44] *Id.* at art. 37.07, § 2(a).

[45] 43A George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 46:4 (3d ed. 2011).

[46] *Id.*

[47] *Id.*

Analysis

Texas's bifurcated-trial system protects the jury's guilt–innocence decision by setting up a firewall for punishment evidence.

But it does more. Once the jury has reached a guilt–innocence verdict, Texas's system also preserves that decision by creating a firewall for punishment error. When a defendant is entitled to a new trial due to punishment error only, that defendant's new trial must be as to punishment only. When reversible error only affects the punishment phase, the Legislature has provided that Texas courts must preserve the jury's lawful guilty verdicts.[48] Article 44.29 provides as follows:

> If the court of appeals or the Court of Criminal Appeals awards a new trial to a [non-capital] defendant . . . only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial under [article 37.07(b)].[49]

Higher courts in Texas have applied that rule for almost 30 years.[50]

And as of 2007, the same rule applies to trial courts. The Texas Rules of Appellate Procedure govern a trial court's power to grant a criminal defendant's motion for new trial.[51] Under Rule 21, a trial court may do so in two ways: either by granting an entire new trial ("the rehearing of a criminal action after the trial court

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[48] Tex. Code Crim. Proc. art. 44.29(b) (West 2014).

[49] *Id.*

[50] *See Carson v. State*, 6 S.W.3d 536, 539 (Tex. Crim. App. 1999).

[51] *See* Tex. R. App. P. 21.

has, on the defendant's motion, set aside a finding or verdict of guilt")[52] or by granting a new trial only on punishment ("a new hearing of the punishment stage of a criminal action after the trial court has, on the defendant's motion, set aside an assessment of punishment without setting aside a finding or verdict of guilt").[53]

Rule 21 states that if the trial court orders an entire new trial, then the case is "restore[d] . . . to its position before the former trial . . . ."[54] But the rule goes on: if the trial court awards only a new punishment phase, then the case returns "to its position after the defendant was found guilty"—that is, just before the punishment phase begins.[55]

The language of Rule 21 is not permissive: a trial court "must grant a new trial when it has found a meritorious ground for new trial . . . ."[56] However, if the ground tainted the punishment phase alone, then the new trial is also contained. Rule 21 states that a trial court "must grant only a new trial on punishment when it has found a ground that affected only the assessment of punishment."[57]

As article 44.29 and Rule 21 suggest, Texas public policy requires all courts to respect lawful jury verdicts when those verdicts are not affected by punishment-phase error.

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[52] *Id.* at 21.1(a).
[53] *Id.* at 21.1(b).
[54] *Id.* at 21.9(b).
[55] *State v. Davis*, 349 S.W.3d 535, 537 (Tex. Crim. App. 2011) (citing Tex. R. App. P. 21.9(c)).
[56] Tex. R. App. P. 21.9(a).
[57] *Id.*

2. *This Court has noted that new trials and mistrials are "functionally indistinguishable." Regardless of which of the two remedies corrects punishment error, a lawful jury verdict should stand.*

This Court should confirm that the public policy honoring lawful jury verdicts applies to punishment-phase mistrials.

Appellant argued below that mistrials were the "functional equivalent" to new trials.[58] And indeed, this Court has observed that new trials and mistrials are "functionally indistinguishable . . . ."[59] For the purposes here, at least, the statement holds true: a mistrial and a new trial may be granted for many of the same reasons.[60] The difference comes down to timing. If the proceedings are still ongoing, counsel calls for a mistrial; but if the proceedings are already completed, counsel must ask for a new trial.[61] This Court has described the difference plainly: "The objection of 'I request a mistrial' seeks to stop the invalid proceedings, while the request for a 'new trial' seeks to put aside a completed trial and start over again."[62]

Because new trials and mistrials are so closely related, this Court should treat punishment-phase error the same no matter how it is corrected. No matter whether punishment-phase error is identified before the judgment is entered (requiring a mistrial) or after (requiring a new trial), the untainted guilt–innocence verdict should

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[58] *Pete*, 2016 Tex. App. LEXIS 6088 at *3–4.

[59] *Ocon v. State*, 284 S.W.3d 880, 884 n.1 (Tex. Crim. App. 2009).

[60] *Compare Wood*, 18 S.W.3d at 648 (describing when a mistrial may be granted) *with* Tex. R. App. P. 21.3 (describing when a new trial may be granted).

[61] *See Cook v. State*, 390 S.W.3d 363, 369 n.12 (Tex. Crim. App. 2013).

[62] *Id.*

be respected. The trial court did not abuse its discretion in applying these principles below.

3. *The trial court's decision gains further support from other caselaw.*

Some Texas cases have acknowledged a trial court's power to declare a punishment-only mistrial. In *State v. Doyle*, for example, Doyle's trial counsel died after the defendant was found guilty, but before the punishment phase began.[63] Expressing concern about the inordinate media attention the trial received and the possibility of ineffective assistance of counsel, the trial court declared a mistrial.[64] It then fell to the Corpus Christi Court to review that decision.[65] Emphasizing a trial court's broad discretion in this area, the *Doyle* court concluded that the trial court did not err.[66] And although the trial court declared a mistrial as to the whole trial, the *Doyle* court noted that was not the trial court's only option. The trial court might also have taken a more light-handed approach: "[t]he trial court would also not abuse its discretion by considering the scenario of the punishment phase being conducted by a new jury, and viewing the infringement on Doyle's statutory right to have punishment assessed by the same jury as unfavorable."[67]

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[63] *State v. Doyle*, 140 S.W.3d 890, 891–92 (Tex. App.—Corpus Christi 2004, pet. ref'd).
[64] *Id.* at 895.
[65] *Id.*
[66] *Id.*
[67] *Id.*

In granting a punishment-only mistrial, the trial court merely followed *Doyle*'s reasonable suggestion.[68] The Court of Appeals erred in overriding the trial court's decision.

4. *No controlling law limits the trial court's discretion to declare a punishment-only mistrial under these facts.*

In support of its decision, the Court of Appeals cited *Bullard*, an opinion that this Court handed down in 1960.[69] The Court of Appeals seemingly latched onto one quote from *Bullard*: "[a]fter a mistrial, the case stands as it did before the mistrial."[70] *Bullard* said nothing more about the effects of a mistrial.[71]

Although correct in its context, that quote does not solve the problem at the heart of this case. That is because it does not apply to bifurcated trials like the one here. Bifurcated criminal trials did not even exist in Texas for more than five years after *Bullard* was decided.[72] Before then, criminal trials in Texas were unitary, and there was no such thing as a punishment phase.[73] Because *Bullard* did not—and could not—consider error isolated to the punishment phase, it should not be read to bar

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[68] *See id.*

[69] *Pete*, 2016 Tex. App. LEXIS 6088 at *6 (citing *Bullard v. State*, 331 S.W.2d 222, 223 (Tex. Crim. App. 1960)).

[70] *See id.* (citing *Bullard*, 331 S.W.2d at 223).

[71] *See Bullard*, 331 S.W.2d at 223.

[72] *See Murphy v. State*, 777 S.W.2d 44, 54 (Tex. Crim. App. 1988) (Onion, P.J., concurring in part and dissenting in part) (describing the history of Texas's bifurcated-trial system); 43A George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 46:4 (3d ed. 2011) (describing same).

[73] *See Murphy*, 777 S.W.2d at 54 (Onion, P.J., concurring in part and dissenting in part); 43A George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 46:4 (3d ed. 2011).

punishment-only mistrials altogether. Texas's bifurcated trial system was a sea change, and it followed *Bullard* by several years. *Bullard*'s holding should not be extended to today, when its unitary-trial underpinning is no more.

The Court of Appeals noted that Appellant relied on this Court's decision in *Hight*, as well as other appellate courts' decisions in *Huseman* and *Bounhiza*.[74] To the extent that the Court of Appeals relied on those cases as well, it was error. Those cases relied on old law, from before a trial court could grant a new trial on punishment only.

In *State v. Davis*, this Court drew a bright red line on January 1, 2007.[75] Before that date, the Court acknowledged that it had held that a trial court could not grant a new trial on punishment.[76] At the time, a reading of Rule 21 (and its predecessors) together with article 44.29 made it clear that a trial court could not grant a new trial solely on punishment.[77] Rule 21, at the time, referred to a "new trial" but not a "new trial on punishment."[78] In addition, Rule 21 explained that the effect of granting a new trial was to "restore[] the case to its position before the former trial," which was not consistent with the consequences of granting a new trial on punishment.[79] And

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[74] *Pete*, 2016 Tex. App. LEXIS 6088 at *3 (citing *State v. Hight*, 907 S.W.2d 845 (Tex. Crim. App. 1995); *State v. Bounhiza*, 294 S.W.3d 780, 781 (Tex. App.—Austin 2009, no pet.); *State v. Huseman*, 17 S.W.3d 704 (Tex. App.—Amarillo, 1999, pet. ref'd)).

[75] *See Davis*, 349 S.W.3d at 537.

[76] *Id.*

[77] *Id.* (citing *Hight*, 907 S.W.2d at 846–47). *See also* Tex. Code Crim. Proc. art. 44.29(b) (West 2006).

[78] *Davis*, 349 S.W.3d at 537.

[79] *Id.* (citing *Hight*, 907 S.W.2d at 846).

although article 44.29 allowed certain courts to grant a new trial on punishment, trial courts were not listed among the courts with the power to do so.[80]

This Court, however, held that "the reasoning for [the former] rule no longer stands" after January 1, 2007.[81] On that day, amendments to Rule 21 took effect.[82] Rule 21 now describes a "new trial on punishment[,]" and specifically allows the trial court to grant one.[83] Further, when an error affects only punishment, Rule 21 requires the trial court to grant a new trial on punishment only.[84] This Court noted that, although article 44.29 does not explicitly allow trial courts to grant new trials solely on punishment, it also does not prohibit them from doing so.[85] Article 44.29 is simply silent on the subject.[86] But because article 44.29 only speaks to the authority of the appellate courts, it does not limit the impact of Rule 21 on trial courts.[87] Thus, this Court reasoned, trial courts have the authority—even the duty, under some circumstances—to grant a new trial on punishment only.[88]

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[80] *Id.* (citing *Hight*, 907 S.W.2d at 846).
[81] *Id.*
[82] *Id.*
[83] *Id.* (citing Tex. R. App. P. 21.1(b)).
[84] *Id.* (citing Tex. R. App. P. 21.1(b)).
[85] *Id.*
[86] *See id.* at 537–38.
[87] *Id.*
[88] *Id.*

In reaching this decision, this Court cited its earlier decision in *Hight* and distinguished it by name.[89] *Hight*, like all other cases decided before 2007, was based on an older version of Rule 21.[90] When Rule 21 changed, the underpinning of *Hight* and the other cases like it was no more. *Hight* does not aid Appellant because it applied pre-2007 law, while post-2007 law governs his cases.

The Court of Appeals observed that Appellant also cited *Huseman* out of the Amarillo Court, but that case merely followed in *Hight*'s path.[91] Like *Hight*, it was decided before the law changed in 2007. *Huseman* cited not only article 44.29, but *Hight*, as well.[92] With its fate tied to *Hight*, *Huseman* fails for many of the same reasons. When those two cases were decided, the law did not allow a trial court to declare a new trial only on punishment, but the 2007 amendments to Rule 21 reversed that policy. More than that, current law even forbids the trial court from ordering a new guilt–innocence phase as part of a whole new trial when the error was contained to the punishment phase.

Bounhiza is another level on the same house of cards.[93] Although it was decided after 2007, it relied on pre-2007 cases and did not consider how Rule 21 had

[89] *Id.* at 537 (citing *Hight*, 907 S.W.2d at 846).
[90] *Id.*
[91] *Huseman*, 17 S.W.3d at 705–06.
[92] *Id.*
[93] *Bounhiza*, 294 S.W.3d at 786.

changed.[94] Because *Bounhiza*'s pre-2007 foundation is no more, this Court should not follow its holding.

Under these facts, Rule 21 would *forbid* a trial court from undoing the guilty verdicts through a new trial. So, under otherwise identical facts, it makes no sense to *require* the trial court to undo the guilty verdicts with a mistrial. To the extent that *Bullard*, *Hight*, or any other case may be read to restrict the trial court's authority to preserve lawful jury verdicts, those cases should be revisited.

Prayer

The State respectfully requests that this Court reverse the Court of Appeals and remand these cases for further proceedings.

Respectfully submitted,

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[94] *Id.*

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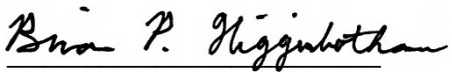

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